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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOOPA VALLEY TRIBE,

Plaintiff,

v.

UNITED STATES BUREAU OF  
RECLAMATION; DEBRA ANNE HAALAND,  
in her official capacity as Secretary of the  
Interior; MARIA CAMILLE CALIMLIM  
TOUTON, in her official capacity as  
Commissioner of the United States Bureau of  
Reclamation; ERNEST A. CONANT, in his  
official capacity as United States Bureau of  
Reclamation California-Great Basin Regional  
Director; and UNITED STATES  
DEPARTMENT OF THE INTERIOR

Defendants.

) Civ. No. 1:20-cv-1814-JLT-EPG

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MEMORANDUM IN SUPPORT OF  
PLAINTIFF HOOPA VALLEY  
TRIBE'S MOTION FOR  
PRELIMINARY INJUNCTION

Date: January 20, 2023

Time: 9:00 AM

Courtroom: 4 – 7<sup>th</sup> Floor, Fresno

Judge: Hon. Jennifer L. Thurston

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... iii

**I. INTRODUCTION**..... 1

**II. FACTUAL AND PROCEDURAL BACKGROUND** ..... 4

    A. Federal Indian Law and Reclamation Law Established Hoopa’s Vested Property Rights in the Trinity River Fishery. .... 5

    B. The TRD Harmed the Trinity Fishery and Severely Damaged Hoopa..... 6

    C. To Protect Tribal Rights, the Secretary and Congress Took Action to Restore Fish and Fish Habitat to Pre-Project Levels. .... 7

    D. To Protect Tribal Rights, the Secretary and Congress Took Action to Restore Fish and Fish Habitat to Pre-Project Levels. .... 8

    E. Hoopa and the U.S. Fish and Wildlife Service Jointly Prepare and, in June 1999, Finalize the Trinity River Flow Study ..... 9

    F. The Secretary and Hoopa Concur in the Recommendations and Sign the ROD..... 10

    G. Federal Defendants Have Unlawfully Decided to Significantly Modify the Timing and Amounts of ROD Flow Releases In the Absence of Hoopa Concurrence..... 11

**III. ARGUMENT**..... 12

    A. This Court Should Issue A Preliminary Injunction to Prevent Irreparable Harm Resulting From Defendants’ Decision to Approve the Trinity River Winter Flow Variability Project, Which Will Unlawfully Modify and Limit Flow Releases Necessary for Restoration of the Trinity River Fishery in the Absence of Hoopa’s Required Concurrence. .... 12

    B. Hoopa Is Likely to Prevail on the Merits of Its Claim That, Pursuant to the Statutory Delegation of Sovereignty Found in CVPIA §3406(b)(23), Flows Prescribed In the Trinity River ROD May Not Be Modified by the WFV Project Absent Hoopa’s Concurrence. .... 12

    C. Hoopa Will Suffer Irreparable Harm Absent Injunctive Relief..... 17

    D. The Balance of Hardships Tips Strongly in Hoopa’s Favor. .... 19

    E. An Injunction Would Be In the Public Interest. .... 20

    F. No Bond Should Be Required In This Action to Protect Hoopa Sovereignty and Trinity River Resources. .... 21

**IV. CONCLUSION** ..... 22

# TABLE OF AUTHORITIES

## Cases

<i>Alliance for Wild Rockies v. Cottrell</i> 622 F.3d 1045 (9 <sup>th</sup> Cir. 2010) .....	17
<i>Blake v. Arnett</i> 663 F.2d 906 (9 <sup>th</sup> Cir. 1991) .....	5
<i>Bugenig v. Hoopa Valley Tribe</i> 266 F.3d 1201 (9 <sup>th</sup> Cir. 2001) .....	14
<i>County of Yakima v. Confederated Tribes &amp; Bands of the Yakima Indian Nation</i> 502 U.S. 251 (1992).....	13
<i>Davis v. Minetta</i> 302 F.3d 1104 (10 <sup>th</sup> Cir. 2002) .....	21
<i>Environmental Defense Fund v. Corps of Engineers</i> 331 F. Supp. 925 (D.D.C. 1971).....	21
<i>Lockheed Missile &amp; Space Co. v. Hughes Aircraft Co.</i> 887 F. Supp. 1320 (N.D. Cal. 1995).....	12
<i>Mattz v. Arnett</i> 412 U.S. 481 (1973).....	5
<i>Montana v. Blackfeet Tribe</i> 471 U.S. 759 (1985).....	13
<i>Parravano v. Babbitt</i> 70 F.3d 539 (9 <sup>th</sup> Cir. 1995) .....	5
<i>People ex rel. Van de Kamp v. Tahoe Regional Planning Authority</i> 766 F.2d 1316 (9 <sup>th</sup> Cir. 1985) .....	21
<i>Ramah Navajo School Board v. Bur. of Revenue</i> 458 U.S. 832 (1982).....	13
<i>Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Engineers</i> 826 F.3d 1030 (8 <sup>th</sup> Cir. 2016) .....	21
<i>Short v. United States</i> 202 Ct. Cl. 870 (1973) .....	5
<i>State of Alabama ex rel. Baxley v. Corps of Engineers</i> 411 F. Supp. 1261 (N.D. Ala. 1976).....	21
<i>United States v. Eberhardt</i> 789 F.2d 1354 (9 <sup>th</sup> Cir. 1986) .....	5
<i>United States v. Washington</i> 853 F.3d 946 (9 <sup>th</sup> Cir. 2017)	

1	<i>affirmed per curiam</i> , 584 U.S. ____ (2018) .....	6
2	<i>Washington v. Confederated Bands &amp; Tribes of the Yakima Indian Nation</i>	
3	439 U.S 463 (1979).....	13
4	<i>Westlands Water Dist. v. U.S. Dep’t of the Interior</i>	
5	376 F.3d 853 (9 <sup>th</sup> Cir. 2004) .....	7, 15
6	<i>Wilderness Society v. Tyrrel</i>	
7	701 F. Supp. 1473 (E.D. Cal. 1988) .....	21
8	<i>Winter v. Natural Resources Defense Council</i>	
9	555 U.S. 7 (2008).....	12, 19
10	<b>Statutes</b>	
11	25 U.S.C. §1901 .....	13
12	Central Valley Project Improvement Act (“CVPIA”)	
13	Pub Law No. 102-575, § 3404-3406, (1992).....	passim
14	Trinity River Basin Fish and Wildlife Management Act (“1984 Act”)	
15	Pub. L. No. 98-541, 98 Stat. 2721 .....	7
16	<b>Other Authorities</b>	
17	Solicitor Opinion	
18	M-36979 (1993).....	5

## I. INTRODUCTION

The 2000 Trinity River Record of Decision (ROD) prescribes specific permanent minimum flow releases and operating criteria and procedures (OCAP) designed to restore the fishery in specific portions of the Trinity River located below Lewiston Dam, which were devastated by the development and operation of the Trinity River Division (TRD) of the Central Valley Project (CVP).<sup>1</sup> The ROD's schedule of minimum flow releases is based on recommendations of a comprehensive scientific flow study co-authored by the Hoopa Valley Tribe and completed in the 1990's, known as the Trinity River Flow Evaluation Report ("Flow Study").<sup>2</sup> In section 3406(b)(23) of the 1992 Central Valley Project Improvement Act (CVPIA), Public Law 102-575, Title XXXIV, Congress directed the Secretary of the Interior to implement the recommended flows and OCAP, but only if the Hoopa Valley Tribe concurred in the recommendations. Absent Hoopa's concurrence, as required by section 3406(b)(23), the Secretary was powerless to implement the recommended flows and OCAP.<sup>3</sup>

Hoopa concurred in the recommendations, signing the Trinity River ROD along with the Secretary of the Interior in 2000, at a sacred location in Hoopa's homeland on the banks of the Trinity River.<sup>4</sup> In CVPIA Section 3406(b)(23), Congress expressly required that the Secretary obtain Hoopa's concurrence before the permanent flow releases could be implemented. It would have been a shock, and entirely unlawful, if the Secretary, shortly after having obtained Hoopa's concurrence in the permanent flow regime, unilaterally proceeded to modify or

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<sup>1</sup> The ROD is reproduced at Exhibit 2 to the Declaration of Thane Somerville, filed herewith.

<sup>2</sup> Relevant excerpts of the Flow Study are reproduced at Exhibit 3 to the Declaration of Thane Somerville, filed herewith.

<sup>3</sup> The complete text of CVPIA Section 3406(b)(23) is reproduced at Exhibit 1 to the Declaration of Thane Somerville, filed herewith.

<sup>4</sup> A map showing the location of the Hoopa Valley Reservation is attached as Exhibit 5 to the Declaration of Thane Somerville, filed herewith.

1 disregard the mandated flow schedule the next week or the next month without Hoopa's  
2 approval. Such a unilateral modification of the restoration program concurred in by Hoopa  
3 would have made a mockery of the statutorily mandated concurrence requirement. In fact, no  
4 Secretary of the Interior has attempted such an action until now.

5 Little more than two decades after signing the ROD, the federal Defendants now take the  
6 position that they can unilaterally modify the flow regime called for in the ROD without  
7 obtaining Hoopa's concurrence. This is no more lawful today than it would have been the day  
8 after the ROD was signed. Congress, in CVPIA § 3406(b)(23) expressly acted with the purpose  
9 to fulfill its trust responsibility to Hoopa and to protect Hoopa's fishery resources. Hoopa is  
10 singularly identified by name in CVPIA § 3406(b)(23) to the exclusion of all other Indian tribes  
11 and all other interests in the Trinity River basin. Congress required the affirmative concurrence  
12 of only one entity, the Hoopa Valley Tribe, in order to implement the flow recommendations.  
13 Congress delegated Hoopa that sovereignty to be a check on the Department of the Interior's  
14 Bureau of Reclamation which for decades had over-diverted Trinity River water to the Central  
15 Valley with devastating consequences to the Trinity River fishery that the United States holds in  
16 trust for Hoopa. Congress expressly stated in CVPIA §3406(b)(23) that the concurred in flow-  
17 regime would be permanent.

18 On December 7, 2022, the Trinity Management Council (TMC) (an advisory body to the  
19 Secretary of the Interior) voted in favor of the Trinity River Winter Flow Variability (WFV)  
20 Project, which would result in significant substantive modifications to when, how, and the use to  
21 which restoration flows prescribed by the ROD are released from Trinity River Division  
22 reservoirs for Trinity River fishery restoration.<sup>5</sup> Hoopa does not concur in the modifications to  
23 the ROD flows called for in the Trinity River WFV Project. Hoopa informed federal  
24 Defendants of its non-concurrence on multiple occasions. Declarations of Joe Davis and

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25 <sup>5</sup> A more complete description of the WFV Project is found at Exhibit 4 to the Declaration of  
26 Thane Somerville.

1 Michael Orcutt. Hoopa again lodged its non-concurrence at the December 7, 2022, TMC  
 2 meeting, voting against the WFV Project. Hoopa had also previously submitted other oral and  
 3 written comments in opposition to the proposal, expressing its non-concurrence. On December  
 4 9, 2022, Hoopa received a letter from the TMC to the Bureau of Reclamation that incorporates  
 5 the WFV Project into the 2023 water year flow schedule and confirmed that the federal  
 6 Defendants could begin such winter flow releases as early as December 15, 2022. Orcutt  
 7 Declaration, Exh. 1. In discussions since December 9, Hoopa requested that Defendants deny  
 8 the WFV Project recommended by the TMC and honor Hoopa's right of concurrence.<sup>6</sup>

9 The WFV Project would significantly and substantively alter the flow regime prescribed  
 10 in the ROD that was concurred in by Hoopa in 2000. In fact, as much as 16—27% of the entire  
 11 annual flow volume prescribed under the ROD would be re-allocated to winter flow releases,  
 12 depriving the river of that water in the Spring and Summer months as called for in the ROD.  
 13 Orcutt Declaration, Exh. 1. Federal Defendants lack authority to substantively modify ROD  
 14 flows and OCAP in the absence of Hoopa's concurrence. Following the December 7 TMC vote,  
 15 and receipt of the December 9 TMC letter, Hoopa made additional efforts to administratively  
 16 stop the decision from going forward in hopes to avoid the need for this request for injunctive  
 17 relief.<sup>7</sup> But federal Defendants have thus far refused to modify the decision.

18 The amount of water provided by the ROD is expressly limited. The re-allocation of  
 19 substantial water called for in the WFV Project means that water intended to be released in  
 20 certain months of the year under the ROD will not be available because it has been re-allocated

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21 <sup>6</sup> Following discussions of the parties, Defendants committed, through a December 15, 2022 e-  
 22 mail from their counsel, that: “[the Interior Department/Defendants] commit to give [Hoopa] at  
 23 least 5 business days notice before any decision is made with respect to the Trinity River (sic)  
 24 Council's vote to recommend the winter flows, and at least 10 business days notice before the  
 implementation of any such decision.” Declaration of Thane Somerville, Exh. 7. However, the  
 specter of implementation of the WFV Project in absence of Hoopa concurrence remains.

25 <sup>7</sup> See December 9, 2022 Letter from Hoopa Chairman to Secretary Haaland, Exhibit 4 to  
 26 Declaration of Joe Davis; see also December 14, 2022 Letter from Hoopa Chairman to Secretary  
 Haaland, Exhibit 5 to Declaration of Joe Davis.

1 for release in different months of the years pursuant to the WFV Project. Federal Defendants’  
2 proposal to release tens of thousands of acre-feet of water in the winter (before the water year  
3 type is even known) means that water will not be available for its intended purposes (as  
4 described in the Flow Study and ROD) later in the Spring and early Summer. If the water  
5 currently called for in the ROD is ultimately necessary in Spring and Summer, it will no longer  
6 be available because it will already have been used in the winter under the WFV Project. This  
7 re-allocation of water, in conflict with the prescriptions and management objectives of the ROD,  
8 in the absence of Hoopa’s concurrence is unlawful.

9 Federal Defendants intend to commence implementation of the WFV Project and its  
10 substantial flow releases imminently. If not enjoined, this unlawful re-allocation of water will  
11 cause irreparable harm to the Trinity River, its fishery, and thus to Hoopa. Once the water is  
12 released, it is forever lost for use for its intended purposes. This is, by definition, irreparable  
13 harm that warrants the issuance of preliminary injunctive relief.

## 14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15  
16 On December 7, 2022, the TMC voted in favor of approving the WFV Project and, on  
17 December 9, the TMC forwarded its recommendation to the Bureau of Reclamation. On  
18 December 12, Plaintiff’s and Defendants’ representatives conferred via video conference call  
19 regarding the WFV Project and Hoopa concurrence. Further communications were exchanged  
20 between December 13-15, 2022, including the December 15 e-mail referenced in footnote 6  
21 above. Another meet and confer of the parties’ representatives and counsel occurred on  
22 December 16, 2022, during which Defendants’ counsel again confirmed that no action would be  
23 taken by Defendants to implement the WFV Project for a minimum of 15 business days (3 full  
24 weeks) following delivery of a written notice from Defendants to the Tribe. To date, Defendants  
25 have declined to reject the WFV Project and have not sought Hoopa concurrence regarding the  
26 WFV Project. Thus, the threat of irreparable harm remains.



1 The federal Defendants decision to approve the WFV Project will result in Reclamation  
 2 making substantial releases of water (between 16 - 27% of total annual flow volumes) from  
 3 Lewiston Dam and making that water wholly unavailable for use later in the year as currently  
 4 prescribed by the Trinity River ROD. The Hoopa Valley Tribe does not concur in this  
 5 substantive modification to the ROD flows and OCAP and it expressed its opposition/non-  
 6 concurrence prior to, at, and after the December 7 TMC meeting. Pursuant to CVPIA  
 7 §3406(b)(23), ROD flows (including their total volumes and their timing) may not be  
 8 substantively modified absent Hoopa's concurrence. Thus, the federal Defendants' decision to  
 9 approve and implement the WFV Project in the absence of Hoopa concurrence is unlawful. The  
 10 factual and legal background regarding Hoopa's statutory concurrence right is described below.

11 **A. Federal Indian Law and Reclamation Law Established Hoopa's Vested Property**  
 12 **Rights in the Trinity River Fishery.**

13 Hoopa and its people have lived along the Trinity River, and relied upon its fish  
 14 resources, since time immemorial. The United States government located and set aside the  
 15 Hoopa Valley Reservation, which the Trinity River flows through, on August 21, 1864. *Mattz v.*  
 16 *Arnett*, 412 U.S. 481, 490, fn. 9 (1973); *Short v. United States*, 202 Ct. Cl. 870, 875-980 (1973).  
 17 On June 23, 1876, President Grant issued an Executive Order formally setting aside the  
 18 Reservation for "Indian purposes." *Short*, 202 Ct. Cl. at 877. Traditional salmon fishing is one  
 19 of the "Indian purposes" for which the Reservation was created. *Parravano v. Babbitt*, 70 F.3d  
 20 539, 546 (9<sup>th</sup> Cir. 1995).

21 In 1864, the United States determined the Reservation a suitable permanent homeland for  
 22 two principal reasons. First, the Reservation is within the heart of Hoopa's aboriginal lands,  
 23 which Hupa Indians occupied and fished upon for generations.<sup>8</sup> *Parravano v. Babbitt*, 70 F.3d  
 24 539, 546 (9<sup>th</sup> Cir. 1995). Hupa Indians possessed fishing and hunting rights long before contact  
 25 with white settlers and their salmon fishery was "not much less necessary to [their existence]

26 <sup>8</sup> Hupa are the people of the federally-recognized Hoopa Valley Tribe.

1 than the atmosphere they breathed.” *Id.* at 542, quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9<sup>th</sup>  
 2 Cir. 1991). Second, the Reservation set aside resources of the Trinity and Klamath rivers for  
 3 Hupa people to be self-sufficient and achieve a moderate living based on fish. *United States v.*  
 4 *Eberhardt*, 789 F.2d 1354, 1359 (9<sup>th</sup> Cir. 1986).

5 Hoopa’s rights entitle Hoopa and its people to take fish from the Trinity and Klamath  
 6 Rivers for ceremonial, subsistence, and commercial purposes. *Eberhardt*, 789 F.2d at 1359. In  
 7 1993, the Interior Solicitor Leshy examined the “history of the [Hoopa] reservation, the Indians’  
 8 dependence on the Klamath and Trinity River fisheries, the United States’ awareness of that  
 9 dependence, and the federal intent to create the reservation in order to protect the Indians’ ability  
 10 to maintain a way of life, which included reliance on the fisheries. 1993 Solicitor Opinion M-  
 11 36979, p. 3. Solicitor Leshy found: “[T]he Government intended to reserve for the [Hoopa] a  
 12 fishing right which includes a right to harvest a sufficient share of the resource to sustain a  
 13 moderate standard of living.” *Id.* at p. 21. Hoopa’s rights are not satisfied simply by the  
 14 presence of fish in the river, but rather by the harvesting of an adequate supply of fish by  
 15 Hoopa’s people. *United States v. Washington*, 853 F.3d 946, 958, 965-66 (9<sup>th</sup> Cir. 2017),  
 16 *affirmed per curiam*, 584 U.S. \_\_\_\_ (2018) (“moderate living” standard requires protection of  
 17 continued supply of fish for the Tribes).

#### 18 **B. The TRD Harmed the Trinity Fishery and Severely Damaged Hoopa.**

19 In 1955, Congress authorized development of the TRD as a feature of the CVP – the  
 20 extensive system of federal dams, canals, and reservoirs that divert, store, and regulate water in  
 21 California rivers and streams. Through the TRD, Reclamation diverts substantial quantities of  
 22 water from the Trinity River and exports it to California’s Central Valley. The TRD is the only  
 23 source of CVP water imported to the Central Valley. The TRD, which includes Trinity Dam and  
 24 Lewiston Dam on the Trinity River upstream of the Hoopa Valley Reservation, became  
 25 operational in 1964, approximately 100 years after the United States set aside the Hoopa Valley  
 26

Reservation as a permanent homeland for Hupa Indians, reserving Trinity River water and fish for their subsistence and livelihood.

Reclamation's construction, operation and maintenance of the CVP's TRD caused widespread catastrophic environmental impacts in both the Trinity basin and in the Central Valley. Damming the Trinity River and over-diverting water to the Central Valley devastated Trinity basin fish and wildlife and caused economic hardship in North Coast Communities. Contrary to the intent of Congress, the TRD's development, operations, and resulting out-of-basin water diversions decimated fish populations including those required to fulfill Hoopa reserved fishing rights. The TRD diverted an average of 88% of the annual inflow out of the Trinity River and into the Sacramento River Basin during its first ten years of operation. *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 861 (9<sup>th</sup> Cir. 2004). The TRD also permanently eliminated fish access to 109 miles of habitat upstream of Lewiston Dam previously used by anadromous fish for holding, spawning, and rearing. Within a decade of the TRD's completion, salmonid populations dramatically decreased. In 1980, the U.S. Fish and Wildlife Service estimated that the Trinity River fish population suffered a reduction of 60% to 80% and fishery habitat loss of 80% to 90%. *Id.* at 862-63. The reduction in salmon populations had, and continues to have, a devastating impact on Hoopa.

**C. To Protect Tribal Rights, the Secretary and Congress Took Action to Restore Fish and Fish Habitat to Pre-Project Levels.**

In 1981, following an environmental study, the Secretary ordered an increase in annual flows released from the TRD to the Trinity River downstream of Lewiston Dam. Under the 1981 Secretarial Order, flows released from the TRD in normal water years increased from 120,500 acre-feet annually to 340,000 acre-feet annually. The Secretary also directed initiation of the Flow Study to study and develop a flow regime and other measures to improve habitat conditions in the Trinity River.

1 In 1984, Congress affirmed and authorized the Secretary’s restoration goal in the Trinity  
 2 River Basin Fish and Wildlife Management Act (“1984 Act”), Pub. L. No. 98-541, 98 Stat. 2721.  
 3 Congress found that “the Secretary requires additional authority [beyond that provided in the  
 4 1955 Act] to implement a basin-wide fish and wildlife management program in order to achieve  
 5 the long-term goal of restoring fish and wildlife populations in the Trinity River basin to a level  
 6 approximating that which existed immediately before the construction of the [TRD].” Section  
 7 2(a) of the 1984 Act directed the Secretary to formulate and implement a program designed to  
 8 restore the fish and wildlife populations in the Trinity Basin to pre-TRD levels. Congress  
 9 required the program to include: (1) rehabilitation of fish habitats in the Trinity River between  
 10 Lewiston Dam and Weitchpec; (2) rehabilitation of fish habitats in tributaries of the Trinity River  
 11 below Lewiston Dam; and (3) modernization and improved effectiveness of the Trinity River  
 12 Fish Hatchery. 1984 Act, § 2(a)(1). The 1984 Act focused on restoration of fish habitat in the  
 13 mainstem Trinity River and its tributaries, which would help to achieve the goal of restoring  
 14 Trinity River fish populations.

15 **D. To Protect Tribal Rights, the Secretary and Congress Took Action to Restore**  
 16 **Fish and Fish Habitat to Pre-Project Levels.**

17 In 1992, Congress passed the CVPIA.<sup>9</sup> Section 3406(b)(23) of the CVPIA, directly at  
 18 issue here, required the Secretary to take specific actions “in order to meet Federal trust  
 19 responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the  
 20 fishery restoration goals of the [1984 Act].” CVPIA, §3406(b)(23). First, the Secretary was  
 21 directed to release, during water years 1992 through 1996, an instream release of not less than  
 22 340,000 acre-feet for the purpose of fishery restoration, propagation, and maintenance. This was  
 23 the amount of flow directed by the Secretary in 1981 and which releases continued up to passage  
 24 of the CVPIA. Second, Congress directed the Secretary, “after consultation with the Hoopa

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25 <sup>9</sup> The full text of CVPIA Section 3406(b)(23) is included as Exhibit 1 to the Declaration of  
 26 Thane Somerville.

Valley Tribe,” to complete the Flow Study by September 30, 1996 “in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and [TRD] operating criteria and procedures for the restoration and maintenance of the Trinity River fishery.” CVPIA §3406(b)(23)(A). Third, following completion of the Flow Study and its recommendations, Congress directed that: “If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph and the operating criteria and procedures referred to in subparagraph (A) shall be implemented accordingly.” CVPIA §3406(b)(23)(B).

**E. Hoopa and the U.S. Fish and Wildlife Service Jointly Prepare and, in June 1999, Finalize the Trinity River Flow Study**

Pursuant to the authority of CVPIA section 3406(b)(23), the Secretary made the Hoopa Valley Tribe and the U.S. Fish and Wildlife Service coauthors of the Flow Study, which they completed, and the Department published in 1999.<sup>10</sup>

Prior to TRD development, the Trinity River was a “dynamic alluvial river,” in which plentiful salmon spawning and rearing habitat existed. *See* Flow Study, Executive Summary, p. xxvi. In the Flow Study, scientists analyzed the fundamental attributes of an alluvial river and how those attributes could be restored (in part) through carefully managed flow releases. *See* Flow Study, Executive Summary. The Flow Study recommended a variable flow regime and management actions (dependent on water year type) to rehabilitate habitat in the mainstem channel of the Trinity River between Lewison Dam and the Klamath confluence at Weitchpec. *See* Flow Study, Chapter 8, Recommendations. The Flow Study recommended a total minimum annual volume of water dependent on water year type but also provided detailed recommendations for specific volumes of releases at specific times of year, along with a discussion of the purpose and benefits of providing those specific volumes at specific times. *See*

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<sup>10</sup> Excerpts of the Flow Study are included as Exhibit 3 to the Declaration of Thane Somerville.

1 Flow Study, Tables 8.5 – 8.7. The flow recommendations in the Flow Study were carefully  
2 developed by Hoopa and federal scientists at Congress’ direction to achieve specific  
3 management objectives and habitat-restorative purposes on the mainstem Trinity River. *See*  
4 Flow Study, Chapter 8, Tables 8.2-8.3. The Flow Study allocated all available annual flow  
5 amounts in the recommended flow regimes to meet the intended objectives.

6 **F. The Secretary and Hoopa Concur in the Recommendations and Sign the ROD.**

7 In the Trinity River ROD, the Secretary and Hoopa accepted and concurred in the  
8 recommendations in the Flow Study. Those adopted recommendations were “based on the  
9 extensive scientific studies contained in the [Flow Study]” and offered “the most practical and  
10 scientifically based restoration strategy.” ROD, p. 8. The ROD “represents the culmination of  
11 over two decades of efforts aimed at understanding the necessary instream flow and physical  
12 habitat restoration requirements in order to restore the Trinity River anadromous fishery.”  
13 Appendix B of the ROD contains detailed release prescriptions (sometimes on a day-by-day  
14 basis) that track the recommendations in the Flow Study. For the time-period of October 16  
15 through April 21, a uniform flow of 300 cfs was adopted across all water years per the Flow  
16 Study recommendations. As described in Chapter 8 of the Flow Study, providing lower flows in  
17 those time periods in and around winter allowed for correspondingly higher flows to occur in  
18 Spring and Summer months, after the water-year type was known.

19 The flows in the ROD do not contain any surplus water that can be repurposed without  
20 compromising the ROD’s intended objectives. Orcutt Declaration. Increasing ROD flows in one  
21 time-period of the year will necessarily result in decreasing ROD flows in other times of year.

22 *Id.* The ROD is a binding contractual commitment, a modern-day treaty, between the Hoopa  
23 Valley Tribe and the Department of the Interior. The federal Defendants cannot modify the  
24 ROD, or the flows (total amount and schedule for release) without the concurrence of the Hoopa  
25 Valley Tribe.  
26

**G. Federal Defendants Have Unlawfully Decided to Significantly Modify the Timing and Amounts of ROD Flow Releases in the Absence of Hoopa Concurrence.**

In 2021, federal Defendants formally proposed implementation of the Trinity River WFV Project. Hoopa informed federal Defendants that “Hoopa does not concur in the proposed modification of ROD flow release hydrographs as currently proposed.” Davis Declaration, Exh. 1, Hoopa Letter, June 18, 2021, p. 2. Hoopa advised that: “The current variability flow release proposal would use ROD flows that are prescribed for specific restoration outcomes as described in the [Flow Study]. However, that water is not available for any purpose or use other than the ROD prescription.” *Id.*, p.3. Hoopa advised that additional scientific review was necessary before any decision by either federal Defendants or Hoopa could be made. *Id.*, p. 4. Hoopa renewed its concerns, objections and non-concurrence on many occasions in 2021 and 2022. Davis Declaration. To date, federal Defendants have declined to conduct such additional scientific review and have disregarded Hoopa’s objections and concurrence rights.

In late 2021, a TMC vote to recommend the WFV Project failed to pass. Thereafter, federal Defendants independently declined to implement the WFV Project in the 2022 water year (October 1, 2021 – September 30, 2022). However, on December 7, 2022, the TMC voted to recommend implementing the WFV Project during the current 2023 water year – beginning as early as December 15, 2022. Hoopa again registered its opposition at the TMC meeting. Hoopa wrote to the federal Defendants communicating its non-concurrence, requesting them to honor Hoopa’s sovereign concurrence rights, and asking them not to implement the WFV Project. Davis Declaration, Exh. 4. Hoopa also met virtually with Federal representatives on December 12 and re-iterated the concurrence requirement. Davis Declaration. Further communications between the parties’ representatives occurred between December 13-16. As of this date, Federal Defendants have thus far declined to honor Hoopa’s concurrence rights as related to the proposed implementation of the WFV Project and corresponding modification of ROD flows. To protect its sovereignty and Trinity River fish and water resources upon which its people rely, Hoopa now



seeks preliminary injunctive relief to preserve the status quo and prevent implementation of the WFV Project pending completion of judicial review.

### III. ARGUMENT

#### **A. This Court Should Issue a Preliminary Injunction to Prevent Irreparable Harm Resulting From Defendants’ Decision to Approve the Trinity River Winter Flow Variability Project, Which Will Unlawfully Modify and Limit Flow Releases Necessary for Restoration of the Trinity River Fishery in the Absence of Hoopa’s Required Concurrence.**

This Court should issue the Preliminary Injunction requested by Hoopa to prevent irreparable harm to Hoopa and the Trinity River fish and water resources upon which its people rely. A plaintiff seeking a Preliminary Injunction must establish that plaintiff is likely to succeed on the merits, likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in plaintiff’s favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). Here, each of the four requirements is met.

#### **B. Hoopa Is Likely to Prevail on the Merits of Its Claim That, Pursuant to the Statutory Delegation of Sovereignty Found in CVPIA §3406(b)(23), Flows Prescribed in the Trinity River ROD May Not Be Modified by the WFV Project Absent Hoopa’s Concurrence.**

In CVPIA Section 3406(b)(23)(A), Congress directed the Secretary to complete the Flow Study, in consultation with the Hoopa Valley Tribe, “in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements . . . for the restoration and maintenance of the Trinity River fishery.” (emphasis added). Following completion of the flow recommendations by the Secretary, Congress directed in CVPIA § 3406(b)(23)(B) that: “If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph . . . shall be implemented accordingly.” (emphasis added). And if Hoopa did not concur in the flow release recommendations, the minimum



1 instream fishery releases expressly specified under Section 3406(b)(23) could not be changed  
 2 absent act of Congress, appropriate judicial decree, or the agreement of the Hoopa Valley Tribe.  
 3 CVPIA § 3406(b)(23)(B). Congress expressly stated that these statutory provisions were  
 4 promulgated “in order to meet Federal trust responsibilities and to protect the fishery resources  
 5 of the Hoopa Valley Tribe.” CVPIA § 3406(b)(23).

6 The letter and intent of CVPIA § 3406(b)(23) is clear. Hoopa’s concurrence was  
 7 required to implement the fishery flow recommendations referenced in Section 3406(b)(23). If,  
 8 and only if, Hoopa concurred, those flow recommendations were to be implemented by the  
 9 Secretary. Hoopa is the only Indian tribe referenced in the statute. *Id.* Congress was acting to  
 10 fulfill its trust responsibility to Hoopa. *Id.* Congress was acting to protect Hoopa’s fishery  
 11 resources. *Id.* And Congress mandated only Hoopa’s concurrence to implement the flows. *Id.*

12 CVPIA section 3406(b)(23) is a statutory delegation of enhanced sovereignty by  
 13 Congress to the Hoopa Valley Tribe as related to implementation of the Trinity River restoration  
 14 mandated in that statute. The United States Constitution vests Congress with “plenary and  
 15 exclusive power over Indian affairs.” *Washington v. Confederated Bands & Tribes of the*  
 16 *Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Congress’ authority over Indian affairs  
 17 includes the responsibility for protecting tribal resources because of their vital importance to the  
 18 existence and integrity of Indian tribes. Congress meets that responsibility through “statutes,  
 19 treaties, and the general course of dealing with Indian tribes.” 25 U.S.C. §1901. As a statute  
 20 passed for the benefit of the Hoopa Valley Tribe, CVPIA section 3406(b)(23) is to be construed  
 21 liberally in Hoopa’s favor. *County of Yakima v. Confederated Tribes & Bands of the Yakima*  
 22 *Indian Nation*, 502 U.S. 251, 269 (1992) (stating, “a principle deeply rooted in this Court’s  
 23 Indian jurisprudence [is that] ‘Statutes are to be construed liberally in favor of the Indians . . .’”,  
 24 quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68 (1985)); *Ramah Navajo School*  
 25 *Board v. Bur. of Revenue*, 458 U.S. 832, 846 (1982) (“We have consistently admonished that  
 26 federal statutes and regulations relating to tribes and tribal activities must be construed

generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.”)

In Section 3406(b)(23), Congress affirmatively and expressly confirmed in reclamation law a trust responsibility to the Hoopa Valley Tribe. And further, Congress ensured that Reclamation would continue to carry out the provisions of 3406(b)(23) in conformance with the federal trust responsibilities by vesting Hoopa with sovereign authority to concur as a condition to implementing the recommended flows and OCAP discussed in Section 3406(b)(23). This delegation of sovereignty in section 3406(b)(23) ensured that the Secretary and subordinate agencies would only implement the recommendations with Hoopa’s approval and that, once approved, the permanent flow requirements and OCAP could only be modified with Hoopa’s concurrence.<sup>11</sup>

Following its passage by Congress, the Secretary acted in accordance with CVPIA § 3406(b)(23). The Secretary, acting through the U.S. Fish & Wildlife Service completed the flow recommendations together in partnership with Hoopa who was a co-author of the Flow Study. The Flow Study provided a comprehensive scientific analysis of the minimum flows necessary to restore fish in the Trinity River below Lewiston Dam to pre-TRD levels as mandated by Congress. The Flow Study not only evaluated and recommended quantity of flow releases but also the timing of flow releases.

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<sup>11</sup> The CVPIA was not the first time Congress made an explicit delegation of authority to Hoopa. Just four years prior to the CVPIA, Congress passed the Hoopa-Yurok Settlement Act, Pub. L. 100-580(1988), 102 Stat. 2924. In a case challenging Hoopa’s delegated sovereignty, the Court of Appeals concluded that the delegation was valid and was needed to resolve confusion over who had the right to “make management decisions relating to the lands and resources of the . . . reservation as a whole.” Senate Report at 9. The Senate Report explains that Congress’ understanding of the law governing the Reservation was that, “absent statutory delegations,” the Hoopas could not manage the Square. *Id.* The ratification and confirmation of the Tribe’s Constitution was exactly that: a “statutory delegation[ ]” of authority to the Tribe to “make management decisions relating to the lands and resources of the ‘Square.’ ” *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1213 (9<sup>th</sup> Cir. 2001).

1 In 2000, standing on sacred ground in Hoopa's homeland on the banks of the Trinity  
2 River, Secretary Bruce Babbitt signed the Trinity River ROD, expressing the Secretary's intent  
3 to implement the recommendations of the Flow Study. But Congress required more than the  
4 Secretary's approval to implement the recommended flows and OCAP; Congress required  
5 Hoopa's concurrence. And Hoopa gave its concurrence, acting through the signature of Hoopa's  
6 Chairperson, on the Trinity River ROD. Only with that signature of Hoopa's Chairperson,  
7 expressing Hoopa's concurrence, could the ROD be implemented. And now, only with Hoopa's  
8 approval may the ROD be changed.

9 The Ninth Circuit Court of Appeals rejected Central Valley water districts' challenge to  
10 the legality of the ROD. *Westlands Water District v. U.S. Dep't of Interior*, 376 F.3d 853 (9<sup>th</sup>  
11 Cir. 2004). The Court found: "Twenty years have passed since Congress passed the first major  
12 Act calling for restoration of the Trinity River and rehabilitation of its fish populations, and  
13 almost another decade has elapsed since Congress set a minimum flow level for the River to  
14 force rehabilitative action. Flow increases to the River have been under study by the Department  
15 of the Interior since 1981. Restoration of the Trinity River fishery, and the ESA-listed species  
16 that inhabit it are unlawfully long overdue." Following the Ninth Circuit's ruling, the ROD and  
17 its prescribed flows and OCAP concurred in by Hoopa went into effect and remains in effect.

18 Pursuant to CVPIA § 3406(b)(23), the flow releases called for in the ROD, and concurred  
19 in by Hoopa, were to be permanent. Now, little more than two decades later, the federal  
20 Defendants take the position that they can unilaterally change the ROD flows that were  
21 comprehensively studied and recommended in the Flow Study co-authored by Hoopa and  
22 ultimately concurred in by Hoopa in the ROD. The federal Defendants position completely  
23 undermines the letter, spirit, and intent of section 3406(b)(23), which was to ensure that the  
24 permanent instream fishery flow releases would be implemented only if Hoopa concurred.

25 An illustration: What if, one-week or one-month after signing the ROD, the Secretary  
26 decided to unilaterally modify the ROD flows, and started implementing a different flow regime

1 or flow schedule not concurred in by Hoopa. It should be obvious that this would have been  
2 unlawful. Such an act by the Secretary, just shortly after obtaining Hoopa's concurrence to a  
3 specific flow regime (both volumes and timing), would have made a mockery of the concurrence  
4 requirement prescribed by Congress. The fact that two decades have now passed since the  
5 ROD was signed and Hoopa's concurrence obtained, does not change the analysis. Federal  
6 Defendants' disregard of Hoopa's concurrence right is unlawful.

7 Hoopa concurred in a specific flow regime, including both total annual volumes and  
8 specific time periods for specific flow releases, which is set forth in the ROD. That flow regime  
9 was based on the recommendations made in the Flow Study called for by Congress and which  
10 Hoopa was a co-author of. There is no dispute that the proposed flows in the Trinity River WFV  
11 Project are a substantive modification of the ROD flows. Indeed, the very purpose of the WFV  
12 Project is to re-allocate ROD flows - taking significant quantities of water allocated for release in  
13 one time of year and re-allocating those quantities to a different time of year. As much as 16 –  
14 27% of the total annual volume of ROD flows would be re-allocated to winter months, depriving  
15 a corresponding amount of flow from being released in Spring or Summer as currently required  
16 by the ROD. Orcutt Declaration, Exh. 1. Such a re-allocation and re-purposing of ROD flows in  
17 the absence of Hoopa's concurrence is plainly unlawful.

18 Hoopa has not concurred in, and expressly does not concur, in the flow regime called for  
19 in the Trinity River WFV Project. Federal Defendants know that Hoopa does not concur. But  
20 the federal Defendants now apparently take the position that Hoopa's concurrence is no longer  
21 required – that they can modify the flows unilaterally regardless of Hoopa's concurrence and  
22 regardless of how such a modification would conflict with the purpose of the ROD flows and the  
23 scientific studies that underlie them. Federal Defendants in their actions now view the  
24 concurrence requirement as optional and transitory – but instead, as directed by Congress, it is  
25 mandatory and durable. Congress required the Secretary of the Interior to obtain Hoopa's  
26 concurrence as an affirmative recognition and delegation of sovereignty to Hoopa. Congress

1 acted, expressly, to fulfill its trust responsibility to Hoopa and to protect Hoopa's trust resources.  
2 The Secretary cannot now administratively terminate Congress' mandates or Hoopa's  
3 sovereignty.

4 Having obtained Hoopa's concurrence, the Secretary could not unilaterally change the  
5 flow regime one week after signing the ROD. And the Secretary cannot change the flow regime  
6 now, two decades later, absent Hoopa's concurrence. In unilaterally modifying the ROD flows,  
7 the federal Defendants have violated CVPIA § 3406(b)(23), and acted arbitrarily, capriciously,  
8 and unlawfully, and without observance of procedure required by law under the APA. Hoopa is  
9 likely to prevail on its claim that federal Defendants have unlawfully ignored the sovereignty  
10 delegated to Hoopa in CVPIA § 3406(b)(23) by approving the WFV Project in the absence of its  
11 concurrence. The WFV Project, with its call to re-allocate and re-purpose flows prescribed in the  
12 Trinity River ROD, may not proceed in the absence of Hoopa's concurrence.

13  
14 **C. Hoopa Will Suffer Irreparable Harm Absent Injunctive Relief.**

15 “[T]he Supreme Court has instructed us that ‘[e]nvironmental injury, by its nature, can  
16 seldom be remedied by money damages and is often permanent or at least of long duration, i.e.,  
17 irreparable.’ *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1053 (9<sup>th</sup> Cir. 2010). Absent  
18 a preliminary injunction, the Trinity River and its fishery (and thus Hoopa) will suffer irreparable  
19 harm because a substantial amount water required by the ROD to be available in Spring and  
20 Summer months (as much as 16 – 27% of total annual ROD volumes) will be lost forever by  
21 being unlawfully released in winter. Orcutt Declaration; Davis Declaration. No money nor other  
22 relief can recover the water that will irretrievably lost by federal Defendants decision to release it  
23 down the river prior to the time it is now required under the ROD. The status quo must now be  
24 maintained.

25 Absent an injunction, Hoopa will also suffer irreparable injury to its sovereignty as  
26 delegated to it by Congress in CVPIA 3406(b)(23). Davis Declaration. Congress mandated that

1 the Secretary obtain Hoopa concurrence in order to implement the ROD. As described above,  
2 this concurrence obligation, in order to have any meaning, applies to initial approval of the  
3 recommended flows and OCAP, and also to future substantive modifications to the flows and  
4 OCAP set forth in the ROD. If, after having obtained Hoopa concurrence in the first instance,  
5 the Secretary could simply unilaterally change the ROD without Hoopa agreement, the  
6 concurrence mandate prescribed by Congress in Section 3406(b)(23) would be meaningless. The  
7 ROD flows, approved with Hoopa's concurrence, were intended to be permanent. And they may  
8 be changed only with Hoopa's concurrence.

9 Hoopa does not concur in the WFV Project. Absent an injunction, the federal Defendants  
10 intend to commence the WFV Project. Allowing the WFV Project to proceed in absence of  
11 Hoopa concurrence causes irreparable harm to the concurrence right provided by Congress. By  
12 expressly granting Hoopa the right of concurrence in Section 3406(b)(23), Congress delegated  
13 sovereignty to Hoopa. The federal Defendants may not act in derogation of that Congressional  
14 delegation of sovereignty by unilaterally changing the ROD flows in the absence of Hoopa's  
15 concurrence. The status quo, preservation of Hoopa's sovereign and statutory concurrence right,  
16 must be maintained pending full judicial review.

17 The Trinity River ROD, and the flow releases provided for therein, are based on  
18 extensive scientific evaluation that culminated in the Flow Study. Hoopa was an author of the  
19 recommendations in the Flow Study and Hoopa concurred in their approval and implementation  
20 in the ROD. The ROD not only set the total minimum annual amounts of water necessary for  
21 Trinity River restoration under the ROD, but it also set a schedule and timeframes for when that  
22 water would be released. This schedule and timing for flows was developed to maximize the  
23 success of the restoration program and to limit any continuing harm to fish.

24 The total amount of water available under the ROD varies based on the type of water  
25 year. The water year runs from October 1 – September 30. However, the type of water year is  
26 not known until April. Thus, the ROD sets a constant base flow amount until the water year

1 determination is known and then the amount of flows in the Spring and Summer is dependent on  
2 the water year determination. Any water released downstream early in the water year will  
3 obviously not be available later in the water year.

4 Under the current WFV Project, the schedule for ROD flows will be substantively  
5 changed without Hoopa's concurrence – moving a large amount of water (minimum 60,000 acre-  
6 feet, equivalent to 16% of total annual volume) to winter months, leaving it unavailable for use  
7 in the Spring and Summer, after the water year is known. If it turns out that fishery managers  
8 have a need in the Spring and Summer for the water used in winter pursuant to the WFV Project,  
9 there will be no recourse under the ROD. The fish will simply have to go without such water  
10 and will suffer the consequent harms.

11 The Federal Defendants decision to approve the WFV Project will deprive the Trinity  
12 River and its fishery of flows that are required by the Trinity River ROD to be released in the  
13 Spring and Summer. Once released in winter, that water will be lost forever. The releases are  
14 approved and Defendants could commence implementation at any time (subject to the 15  
15 business days advance notice to Hoopa that Defendants' committed to, see fn. 6 above). Thus, a  
16 preliminary injunction is necessary to prevent the Defendants from releasing such flows in  
17 conflict with the ROD.

18 **D. The Balance of Hardships Tips Strongly in Hoopa's Favor.**

19 In deciding whether to grant a preliminary injunction, the Court "must balance the  
20 competing claims of injury and must consider the effect on each party of the granting or  
21 withholding of the requested relief." *Winter*, 555 U.S. at 24. Here, Defendants would suffer no  
22 harm if enjoined from implementing the Trinity River WFV Project. Rather, they would remain  
23 bound to implement and release flows as called for in the Trinity River ROD, the document that  
24 has guided Trinity River restoration actions pursuant to its science-based flow recommendations,  
25 for over twenty years. In contrast, the consequences of depriving the Trinity River of the flows  
26



1 called for in the Trinity River ROD could be catastrophic to the Hoopa Valley Tribe, its  
2 sovereignty, and the fishery upon which it depends. Once that water is released, it is gone  
3 forever.

4 Relief is necessary immediately. Once releases pursuant to the WFV Project are made,  
5 that amount of water is lost to ROD implementation for the rest of the water year, leaving the  
6 river and its fishery in a precarious state during later months. The Trinity River ROD and the  
7 scientific studies that preceded it carefully allocated the limited flows available to best meet the  
8 needs of fish. Increasing flows in one season will necessarily decrease flows in a different time  
9 of year. Such modification of the Trinity ROD flows may not occur without the concurrence of  
10 the Hoopa Valley Tribe. A preliminary injunction is necessary and warranted.

11 **E. An Injunction Would Be In the Public Interest.**

12 The public interest favors Hoopa's motion. The public interest is an important factor to  
13 weigh in deciding whether courts should grant preliminary injunctions. Here, failure to grant  
14 injunctive relief would place the public's interest in protection and restoration of the Trinity  
15 River fishery, as mandated by Congress, and as directed in the Trinity River ROD, at significant  
16 risk. The public interest supports preservation, protection, and restoration of Trinity River fish  
17 stocks. The Hoopa Valley Tribe and the federal government have dedicated extensive resources  
18 over decades towards restoration of the Trinity River fishery. Specific flow measures were  
19 studied and agreed upon by Hoopa and the United States to be of critical importance to fishery  
20 restoration. Now, notwithstanding Hoopa's non-concurrence, the Defendants propose to  
21 abandon that flow regime, shifting certain flow releases to winter, while necessarily depriving  
22 the Trinity River of flows at other times of year. Taking actions that undermine the Trinity River  
23 ROD, and its science-based program of restoration flows and other restoration measures, is not in  
24 the public interest. Nor is it in the public interest for the federal Defendants to derogate Hoopa's  
25  
26



1 authority in this matter through an unlawful termination of the statutory delegation of  
2 sovereignty to Hoopa.

3 **F. No Bond Should Be Required In This Action to Protect Hoopa Sovereignty and**  
4 **Trinity River Resources.**

5 Rule 65 references the posting of security upon issuance of a temporary restraining order  
6 or preliminary injunction, however the Court has authority to dispense with the security or to  
7 require mere nominal security. *People ex rel. Van de Kamp v. Tahoe Regional Planning*  
8 *Authority*, 766 F.2d 1319, 1325-26 (9<sup>th</sup> Cir. 1985). Courts often waive the bond requirement or  
9 require nominal security in public interest litigation against federal agencies. *Richland/Wilkin*  
10 *Joint Powers Auth. v. U.S. Army Corps of Engineers*, 826 F.3d 1030, 1043 (8<sup>th</sup> Cir. 2016)  
11 (district court has discretion to waive bond requirement based on its evaluation of public  
12 interest); *Davis v. Minetta*, 302 F.3d 1104 (10<sup>th</sup> Cir. 2002) (where a party is seeking to vindicate  
13 the public interest, a minimal bond amount should be considered when granting a preliminary  
14 injunction); *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988) (setting bond  
15 of \$100 for preliminary injunction barring timber sale); *Environmental Defense Fund v. Corps of*  
16 *Engineers*, 331 F. Supp. 925, 927 (D.D.C. 1971) (\$1 bond for preliminary injunction restraining  
17 construction of 253-mile long waterway project). In setting a \$1 bond, the court commented in  
18 *State of Alabama ex rel. Baxley v. Corps of Engineers*, 411 F. Supp. 1261, 1276 (N.D. Ala.  
19 1976): “This Court is simply unwilling to close the courthouse door in public interest litigation  
20 by imposing a burdensome security requirement on plaintiffs who otherwise have standing to  
21 review governmental action.”

22 Here, the Court should waive the security requirement or impose nominal security.  
23 Hoopa brings this action on behalf of itself and its members in protecting the Trinity River, its  
24 fishery, and Hoopa trust resources and sovereignty from harm caused by unlawful federal  
25 government action. Hoopa’s action is consistent with and supportive of the public interest in  
26 protecting the river and the fishery. Hoopa has demonstrated high likelihood of success on the

merits and the Defendants would suffer no cognizable prejudice from the requested injunctive relief. A waiver of security or imposition of nominal security is warranted.

#### IV. CONCLUSION

Plaintiff Hoopa Valley Tribe requests that this Court enter a preliminary injunction that bars Defendants from implementing the Trinity River WFV Project in the absence of the concurrence of the Hoopa Valley Tribe. This relief is necessary to prevent irreparable harm that would result from these unlawful releases of water that are otherwise allocated to fishery restoration flows in the Trinity River ROD, and to Hoopa's sovereignty.

Dated this 16<sup>th</sup> day of December 2022.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Thane D. Somerville  
Thane D. Somerville